

11-3100-6882-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Kenneth Thomsen,

Petitioner,

v.

Hennepin County,

Respondent.

ORDER DENYING RESPONDENT'S  
MOTION FOR SUMMARY  
DISPOSITION AND ORDER  
ON MOTION IN LIMINE

The above-entitled matter is before Administrative Law Judge Barbara L. Neilson on the Respondent's Motion for Summary Disposition and Motion in Limine. No oral argument was conducted on the Motions.

Demitra H. Tolbert, Special Assistant County Attorney, Office of the Hennepin County Attorney, 2000 Government Center, Minneapolis, Minnesota 55402 submitted Respondent Hennepin County's motions. Karla R. Wahl, Attorney at Law, 1950 Piper Jaffrey Tower, 222 South Ninth Avenue, Minneapolis, Minnesota 55402 submitted Petitioner's memoranda and moved for an order of contempt. record closed on this motion on May 13, 1994, upon receipt of supplemental memoranda from the parties.

Based on the record herein, and for the reasons set out in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

1. Respondent's Motion for Summary Disposition is DENIED.
2. Respondent's Motion in Limine is GRANTED to preclude introduction of evidence of Petitioner's emotional state as irrelevant, immaterial and beyond the jurisdiction of the Veterans Preference Board.
3. Petitioner's motion to hold Respondent in contempt is denied.

Dated: June \_\_\_\_, 1994.

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BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

### Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K).

Respondent's burden in bringing a motion for summary disposition is to show that an essential element of Complainant's case does not exist. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). If this burden is carried, there can be no material issues of fact remaining for hearing. Id. To successfully resist a respondent's motion for summary disposition, the nonmoving party must demonstrate all the elements of the case alleged. If there are specific facts in dispute which have a bearing on the outcome of the case, the case will proceed to hearing. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

General averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Carlisle, 437 N.W.2d at 715. However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex, 477 U.S. at 324 (1986)). The nonmoving party is entitled to the most favorable view of the evidence. Foley v. Allard, 427 N.W.2d 647, 649 (Minn. 1988). The factual discussion in this Memorandum applies that standard to the evidence submitted in support of each parties' position.

The standard to determine whether an issue is "genuine" and "material" is similar to the federal directed verdict standard. Where under the governing law there can be only one reasonable conclusion as to the verdict in the matter, the issue is neither genuine or material. Carlisle, 437 N.W.2d at 715 (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986)).

### Petitioner's Employment

Petitioner began work with Hennepin County in 1976 as a Property Description Technician. Petitioner was promoted to Senior Engineering Technician (SET) in the Survey Division of the Hennepin County Property Tax Public Records Department (the Survey Division) in February, 1985. The duties of an SET were set forth in a position description originally drafted in

November, 1978, and revised in January, 1985. Amended Thomsen Affidavit, Exhibits B and C.

On April 14, 1989, Petitioner received a memorandum from Gary Caswell, Petitioner's Supervisor, to Bernard Larson, County Surveyor. Amended Thomsen Affidavit, Exhibit E. The memorandum alleged Petitioner committed insubordination and exhibited incompetence in performing his duties. Petitioner responded in writing to that memorandum on April 20, 1989. Id., Exhibit F. Petitioner's job duties were changed to those of an engineering technician. Petitioner was returned to his original job duties on May 2, 19

In March, 1990, Petitioner's job tasks were changed. The tasks performed were those in the graphics department or public information section. The tasks had previously been performed by a Computer Graphics Technician or an Engineering Technician.

Due to his employment situation, Petitioner pursued his right to a hearing before the Hennepin County Personnel Board (the Board). The Survey Division styled the matter as a proposed demotion. The final decision of the Board, issued on September 8, 1991, was to reinstate Petitioner to the classification of SET without loss of pay.<sup>1</sup>

An organizational chart was prepared by the Survey Division, dated June 1990, which shows Petitioner as the third engineering technician under Principal Engineering Technician Pete Tulkki. Amended Thomsen Affidavit, Exhibit G. An FTE (full-time equivalent) position for an STE is shown as vacant in survey analysis section under Supervising Engineering Technician Caswell and Principal Engineering Technician Byron Eaves. Both Eaves and Caswell had been supervisors of Petitioner prior to Petitioner's change of duties.

The Survey Division has moved for summary disposition on the ground that Petitioner is not entitled to relief under the Veteran's Preference Act. Petitioner maintains that he has been demoted through his assignment to work out of his employment classification. The Survey Division asserts that Petitioner's job classification and rate of pay have not changed and any change in job duties is with the Survey Division's managerial discretion.

#### Right to a Hearing

Certain rights are afforded to honorably discharged veterans of the armed forces of the United States. Among those rights is a prohibition against removal from classified civil service positions except for reasons of incompetency or misconduct. Minn. Stat. § 197.46. This prohibition extends

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<sup>1</sup>/ A clarification of the Board's decision was sought to determine what effect the Board intended its Order to have on Petitioner's employment situation. The Board issued a Supplemental Order on November 10, 1993, which stated:

IT IS HEREBY the decision and order of the Hennepin County Personnel Board that the Order dated July 8, 1991, intended to

leave Employee Ken Thomsen in the classification of Senior Engineering Technician and that decisions regarding assignment of specific job duties within that classification are managerial decisions to be made by the department.

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to positions "in the several counties, cities, towns, school districts and other political subdivisions in the state ...." Id. Petitioner served on active duty with the United States Marine Corps and received an honorable discharge. His position as an SET falls within those positions covered by Minn. Stat. § 197.46.

#### De Facto Demotion

An employer's right to assign duties to its employees and assign classifications to their positions is well established. Gorecki v. Ramsey County, 437 N.W.2d 646, 649 (Minn. 1989). However, employers are obligated follow the requirements of the Veteran's Preference Act in taking action relating to employees who are veterans. If an employee is to be demoted, it must be on the grounds of insubordination or incompetence. Minn. Stat. § 197.46.

In Ammend v. Isanti County, 486 N.W.2d 3 (Minn.App. 1992), the Minnesota Court of Appeals considered whether a Chief Deputy could be demoted without action by the Isanti County Board. The Court stated:

Although Minnesota courts have not defined what it is to be demoted, Black's Law Dictionary defines demotion as a "reduction to lower rank or grade, or to lower type of position." Black's Law Dictionary, 5th Ed. (1983). After Southerland [the new County Sheriff] took office, he and Ammend [the veteran] met to discuss Ammend's future in the department. Southerland made it clear that if Ammend chose to continue working in the department, he would no longer be involved in the supervisory or administrative decisions in the department and that he would be relegated to performing the least desirable jobs. Ammend agreed to continue working and subsequently performed only non-Chief Deputy tasks. We conclude that this constituted a demotion and that Ammend became the type of employee that the Veterans Preference Act was intended to protect.

The county argues that because the county board did not authorize it, Ammend could not have been demoted. It is settled that interpretation of an employer's action is a matter of substance and not of form. Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). Therefore the fact that Ammend was not demoted through a formal process is not dispositive. We think that the action Southerland took in changing Ammend's job duties was, in substance, a demotion, and that the agency [the Department of

Veterans Affairs] did not err in implementing the protections of the VPA.

Ammend, 486 N.W.2d at 6-7.

Under the holding in Ammend, the Petitioner's retention of his job classification and salary does not, as a matter of law, dispose of his claim under the Veterans Preference Act. The comparison of actual duties assigned Petitioner is relevant to determine if he was demoted.



### Authority to Grant Relief

The Survey Division asserts that the Department has no authority to grant relief other than require Petitioner be given the classification of SET and reimbursed for wages lost due to any improper classification. Since Petitioner's classification has not been changed from SET and no wages have gone unpaid, the Survey Division argues that this matter is moot, and no relief can be granted. Petitioner argues that he must be returned to the job duties he held before his reassignment to remedy his demotion.

The Veterans Preference Act is triggered when a veteran is removed from position by demotion or discharge. In the Matter of Schrader, 394 N.W.2d 79, 802-3 (Minn. 1986)(Simonett, J., concurring specially). In Ammend, the Court of Appeals considered the issue of a remedy when a veteran was demoted by a change of job duties. The Court of Appeals stated:

When a veteran has been denied rights under Minn. Stat. § 197.46 the agency can grant "such relief the Commissioner finds justified by said [statute]." Minn. Stat. § 197.481 Subd. 1 (1990). The agency ordered that Ammend either be reinstated as "a non-chief deputy performing tasks similar to those he performed after January 7, 1991" or "the welfare fraud investigator's position." This is a sound disposition because in essence it restores to Ammend what he lost when he was dismissed, and at the same time it gives the county latitude in choosing a specific position for Ammend which will fit the overall structure of the department.

Ammend, 486 N.W.2d at 7.

Matters under the Veterans Preference Act are not limited to classification pay issues where a demotion has occurred. This matter is not moot on that basis.

### Genuine Issues of Material Fact

To successfully resist a motion for summary disposition, the nonmoving party must show that genuine issues of material fact remain for hearing. Petitioner has alleged a change of his job duties from those of an SET to those of an engineering technician and a computer graphics technician. Amended Thomsen Affidavit, at 3. An organizational chart prepared in June, 1990, shows Petitioner in an engineering technician position. Id., Exhibit G. While a later chart shows Petitioner in an SET position, Petitioner alleges no changes were made in his job duties since June, 1990. A conversation is alleged

between Petitioner and County Surveyor Larson in which Larson stated that the classification did not matter, the Personnel Board reinstatement order did not matter, and the job duties being below those of an SET did not matter. Petitioner alleges that Larson told him that his job duties would not be changed.

Petitioner has raised specific, detailed allegations of a de facto demotion, conducted in spite of a Personnel Board Order that Petitioner be reinstated to his position. These are not general averments, but genuine issues of material fact that can only be resolved at a hearing.

#### Contempt

Petitioner has requested the Survey Division be held in contempt for its failure to abide by the Order of the Personnel Board. Administrative tribunals have no contempt power. No agency, including the Office of Administrative Hearings, can exercise a power beyond its statutory authority. Wallace v. Commissioner of Taxation, 184 N.W.2d 588, 594 (Minn. 1971); see Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1981). The Petitioner's request that the Survey Division be held in contempt must be denied.

#### Motion In Limine

The Survey Division has requested the issues be limited if this matter proceeds to hearing. The specific relief requested is as follows:

- a. clarifying that promotion or reassignment of duties are not remedies available under the Veterans Preference Act;
- b. precluding introduction of evidence of Petitioner's emotional state as irrelevant, immaterial and beyond the jurisdiction of the Veterans Preference Board; and
- c. precluding introduction of evidence of Petitioner's physical capabilities, as irrelevant, immaterial and beyond the jurisdiction of the Veterans Preference Board; and
- d. precluding introduction of evidence of remedies not available under the Veterans Preference Act, specifically, but not limited to: all lost promotional opportunities or wages, and assignment to specific job duties within the same job classification.

Respondent's Motion for Summary Judgment, at 2-3.

The holding in Ammend disposes of much of the Survey Division's request. Remedies authorized under the Veterans Preference Act include reassignment to specific job duties. Ammend, 486 N.W.2d at 7. Thus, the limitations in items a and d of Respondent's Motion are improper. Petitioner's physical condition

may be relevant to the propriety of any assignment made, denied, or ordered this matter. See Myers v. City of Oakdale, 409 N.W.2d at 851.

There has been no showing that Petitioner's emotional state is any way relevant to this matter. There is no authority under the Veterans Preference Act to award damages for injury resulting in emotional distress. No allegation has been made the Petitioner's emotional state has affected his ability to perform job functions. Respondent's Motion is granted as to evidence of Petitioner's emotional state and the introduction of such evidence is precluded.

B.L.N.